See also Vol. 3191

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Y W. CHRISTENSEN, TRUSTEE,

Appellant   CASE NO. 18267

-vs-

BERT T. FELTON and JEAN
LSON FELTON,

Appellees

FILED

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SUBJECT INDEX

Table of Authorities Cited ii

Appellees' Supplemental
Statement of the Case 1

Summary of Argument 10

Argument 13

Certificate. 38

TABLE OF AUTHORITIES CITED

Cases | Page

Allegheny County Housing Admin. v. Conisto Const. Corp. (D.C. Penn., 1950) 90 F.Supp. 1007 18

Brown v. N.Y. Life Ins. Co. (D.C.Or, 1945) 58 F.Supp. 252, affirmed 152 F.2d 246 18

Matter of Dahnke-Walker Milling Co. (D.C. Tenn., 1924) 1 F.2d 404 34

Daniels v. Daniels, 81 Idaho 12, 336 P.2d 112 30

Dasher v. Bruno (Ill., 1955), 216 N.E. 2d 404 24

Deitrick v. Greaney, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 16

Farmers & Merchants Nat'l Bank v. Bailie (D.C.A. Cal., 1934) 32 P.2d 157 23

In re Graziani (D.C. N.Y., 1958) 166 F.Supp. 516, affirmed, McChesney v. Sims (C.C.A. 2, 1959) 267 F.2d 215 23

Hanny v. Sunnyside Ditch Co., 82 Idaho 271, 353 P.2d 406 19

In re Hercules Service Parts Corp. (D.C. Mich., 1951) 101 F.Supp. 455 14

Ell v. Schultz, 71 Idaho 145, 227 P.2d 586 33

Isley v. State Mut. Life Assur. Co. (Penn. 1909) 5 A.2d 544 29

Kssler v. Jefferson Storage Corp. (C.C.A. 6, 1941) 125 F.2d 108 . . . 31, 33

Ickhart v. Garden City Bank & Trust Co. (C.C.A. 2, 1940) 116 F.2d 658 14

FA. McGrow & Co. v. Milcon Steel Co. (C.C.A. 2, 1945) 149 F.2d 301 23

Mrine Northwest Development Co. v. Northern Commercial Co. (D.C. Wash., 1914) 213 F. 103 . . . 32

In re Midwest Tar Corp. (D.C. Mary., 1956) 150 F.Supp. 163 13

Mller v. The American Tobacco Co. (D.C. N.Y., 1958) 158 F.Supp. 48 . . 30

Oerfield v. Pennroad Corp. (D.C. Penn., 1941) 42 F.Supp. 586, affirmed, 146 F.2d 889 19

Roinson v. Hamilton Wholesale Liquor Co. (C.C.A. 6, 1942), 132 F.2d 285 34

Scarborough v. Atlantic Coast Line Railroad Co. (C.C.A. 4, 1949) 178 F.2d 253 . . . . 18, 26

Scultz v. England (C.C.A. 9, 1939) 106 F.2d 764 13

Stearns v. Williams, 72 Idaho 276, 240 P.2d 833 30

In re Tastyeast, Inc. (C.C.A. 3, 1941) 126 F.2d 879 14

In re Toms (C.C.A. 6, 1939) 101 F.2d 617, 619 14

In re Webber Motor Co. (D.C. N.J., 1943) 52 F.Supp. 742 14

Witthoft v. Commercial D. & I. Co. 46 Idaho 313, 268 Pac. 31 27

Wyoming Const. Co. v. Western Casualty Co. (C.C.A. 10, 1960) 275 F.2d 97 18

Treaties

12 Am. Juris. 220, p. 738 33

3 Colliers on Bankruptcy, Sec. 63.03 (2), p. 1769 (14th Ed.) 34

3 Colliers, Bankruptcy 1799 (14th Ed. 1941) 14

Collier Bankruptcy Manual, Sec. 39.11 p. 430 (2nd Ed., 1961). 22

Corbin on Contracts Vol. 3, Sec. 748, p. 893. 17

17 C.J.S. 318 p. 738. 16

17 C.J.S. 319 p. 740. 16

Restatement of the Law of Contracts 307, p. 453 15

Restatement of the Law of Contracts
302 18

3 Williston on Contracts 677,
p. 1952 (Re.Ed.). 17

3 Williston on Contracts 769,
p. 2170 (Re.Ed.). 16

Federal Statutes

Bankruptcy Act, Sec. 39, (11,
U.S.C., 67) 21

Bankruptcy Act, Sec. 2. a. (10),
(11 U.S.C. 11). 22

State Statutes

Idaho Code, 30-142 19

APPELLEE'S SUPPLEMENTARY STATEMENT OF THE CASE

The questions on appeal are:

1. Can the appellant, trustee in bankruptcy of McDonnell Seed Company, assert the provision entitled "Term" of the "Stoc Sales" agreement as a defense to the appellees' unsecured creditors claim in the ban-rupt estate of McDonnell Seed Company?

2. Is proof of systematic "pirating" by the bankrupt relevant in this case?

McDonnell Seed Company, a Washington corporation, was purchaser of stock on contracts from appellees, stockholders of Washburn-Wilson Seed Company, an Idaho corporation. (Exhibits 1 and 2). The contra was drafted and formulated by attorneys fo both parties and prepared in the office of Tom Felton of Felton & Bielenberg, Moscow, Idaho. (Tr. 136-138, 167, 168). The subj matter of the contract, preparation, execu

and performance thereof being in the State of Idaho; the referee found that the substantive law of the State of Idaho governed the contract. (Tr. 60). The stock certificates were placed in escrow in the First Security Bank in Moscow, Idaho. (Tr. 172-173). The purchaser under the contract was given all incidents of ownership of stock as long as the contract was not in default. The default of purchaser entitled seller to either (a) sue for the unpaid balance, or (b) take the stock and forfeit payments made. (Exhibit 1, p. 4.).

The "Stock Sale" agreement contained a clause entitled "Term" which provided for termination of the agreement in the event of bankruptcy of either the seller (an obvious clerical error) or Washburn-Wilson Seed Company.

The assets of Washburn-Wilson Seed Company were two and one-half ($2\frac{1}{2}$) times its liabilities as of the date of the "Stock

Sale" agreement. (Tr. 222).

The appellees, by instruction to the parties' escrow agent, released the stock certificates to the purchaser, McDonnell Seed Company prior to the bankruptcy of either company. (Exhibits 5, 6 and 7) (Tr. 175 and 182).

Washburn-Wilson Seed Company and McDonnell Seed Company were adjudicated bankrupts during October, 1960. (Tr. 60). The stock of Washburn-Wilson Seed Company was rendered valueless by its bankruptcy. (Tr. 147).

The Referee in bankruptcy at the hearing on appellees' claim sustained trustee's objections to evidence (Tr. 252), sought to be introduced relative to the conduct of McDonnell Seed Company and its officers and directors after date of the contract, for the reason that such evidence was immaterial and its admission would be a direct and clea violation of the parol evidence rule. (Tr.23

The Referee concluded during the hearin

that the "Stock Sale" agreement was terminated by the bankruptcy of Washburn-Wilson Seed Company and that the trustee was entitled to stand on that termination. (Tr. 256). Thereafter, though he refused to accept it, the Referee did allow the appellees to introduce testimony showing "pirating" of assets by the purchaser through the regular process of examination and cross-examination of witnesses.

This testimony so recorded revealed that; the boards of directors were the same in both companies (Tr. 164), there were no formal directors' meetings after date of stock sale (Tr. 153), the officers were substantially the same in both companies (Tr. 152), Leo McDonnell owned all the stock of McDonnell Seed Company (Tr. 155), and ran the company (Tr. 154), assets of Washburn-Wilson Seed Company of a value of some 100,000.00 were pledged to the Washington Trust Bank of Spokane to secure indebtedness

of McDonnell Seed Company (Tr. 270, 283 and 284, 302 and 303), commodities owned by in- dependent growers were shipped without authr ity from facilities of Washburn-Wilson Seed Company on instructions from McDonnell Seed Company without payment being made therefor to growers (Tr. 272, 314).

No records were kept in the control accounts of Washburn-Wilson Seed Company since December 31, 1959 (Tr. 276); that Leo McDonnell, McDonnell Seed Company and agent thereof conducted a scheme whereby time drafts drawn principally on A.J. Arthur Co. New York, New York, and Bev Dach, Seattle, Washington, were presented to the First Security Bank, Moscow, Idaho, for deposit credit, obtaining temporary credit thereby, then forwarding money to A.J. Arthur Co. prior to the date when payment had to be made on the draft, all according to pre- arranged plan (Rejected Exhibit 11), (Tr. 278-279, 281-283, 297, 299, 301), A.J. Arth

Co. was indebted to Washburn-Wilson Seed Company as of date of bankruptcy in the amount of $279,603.90 by reason of money forwarded to A.J. Arthur Co. in excess of drafts accepted and paid (Tr. 322); the inventory shortage of Washburn-Wilson Seed Company as of the date of Washburn-Wilson Seed Company bankruptcy amounted to $176,000.00 (Tr. 322); auditors of the trustee in bankruptcy for Washburn-Wilson Seed Company were unable to reconcile the transactions which took place between Washburn-Wilson Seed Company and McDonnell Seed Company (Tr. 322); that Washburn-Wilson Seed Company indebtedness to the First Security Bank, Moscow, Idaho, as of the date of its bankruptcy was in excess of $400,000.00 (Tr. 208); funds of Washburn-Wilson Seed Company were used to pay off indebtedness of McDonnell Seed Company (Tr. 305).

On review by the District Court, the Court considered the clause around which

dispute here revolves as inoperative and determined in his written opinion that the appellant stood in the shoes of the bankrup, taking the contract subject to the same equities and defenses as would the bankrupt (Tr. 85, 101) in effect overruling the referee's order wherein he had rejected the tendered evidence relating to "pirating" an other conduct of the purchaser. Inasmuch a the District Court determined that when the purchaser was first taking the assets of th Washburn-Wilson Seed Company the contract was in effect and de facto in default (Tr. 86); that the purchaser and its officers from the record are shown to have breached their fiduciary duty to sellers and to have rendered the security worthless by their fraudulent conduct. (Tr. 86).

The District Court determined that the clause entitled "Term" is repugnant to good conscience and invites fraud and to hold the contract clause enforceable would permit the

purchaser, its officers and now the trustee, to "pirate" the assets of Washburn-Wilson Seed Company and thus rob the stockholders while occupying a fiduciary capacity towards them and that such a clause and interpretation is against public policy. (Tr. 85, 86).

District Judge Powell entered an order (Tr. 101-102) reversing the Referee, concluding as a matter of law:

1. That the provision entitled "Term" is unenforceable in the bankruptcy in this matter, for the trustee in this instance stands in the shoes of the bankrupt subject to the same equities and defenses as would the bankrupt.

2. That the contract clause is void as against public policy.

3. That the "Stock Sale" agreement did not terminate nor did the obligations of McDonnell Seed Company to pay the balance of the purchase price thereunder cease upon the adjudication of McDonnell Seed

Company and Washburn-Wilson Seed Company a
a bankrupt.

This appeal is from this order of the
District Court.

SUMMARY OF ARGUMENT

The "Stock Sale" agreement (attached to Exhibit 1) did not terminate, nor did the obligations of McDonnell Seed Company to pay the balance of the purchase price there under cease upon the adjudication of Washburn-Wilson Seed Company or McDonnell Seed Company as a bankrupt. The respondent urges:

1. That the appellant, trustee in bankruptcy of McDonnell Seed Company, in this instance stands in the shoes of the bankrupt subject to the same equities and defenses as would the bankrupt.

2. That forfeiture and termination under the contract clause, even if found a valid clause, should not be interpreted to become automatically operative or applicable when the bankruptcy has been caused by the wrongful and fraudulent conduct of the bankrupt.

a. The law presupposes that the parties

to a contract will deal fairly in the performance thereof and such would have been the contemplation of the parties in using the contingency of bankruptcy to terminate the contract. This is especially true in this instance inasmuch as the purchaser stood in fiduciary relationship to the sellers of stock and Washburn-Wilson Seed Company.

b. An interpretation of the word "bankruptcy" to include any bankruptcy occurring would allow the purchaser to "pirate" the assets of Washburn-Wilson Seed Company, thus destroy the security held by the sellers, causing the occurrence of the bankruptcy, thereby eliminating its obligations under the contract, and resulting in a benefit created by its own wrongful acts.

3. The contract was breached by McDonnell Seed Company as of the time that assets of Washburn-Wilson Seed Company were first taken or converted to the use and benefit of McDonnell Seed Company and was in default

at the time that bankruptcy occurred, therefore, the "Term" clause upon which appellant relies never became operable. The sellers have the remedy as provided at page 4 of the contract (Exhibit 1) of claiming the balance of the purchase price.

4. The contract clause entitled "Term" was designed for the protection of the seller of stock and is permissive, but not mandatory in its operation.

5. The bankrupt's hands were "unclean" and appellant may not rely upon the occurrence of this condition subsequent as his defense.

6. The "Term" provision is repugnant to good conscience, invites fraud and is void as against public policy.

7. A provision of a contract which may be void or unenforceable does not in itself void the remainder of the contract.

8. A debt of the bankrupt is none the less provable as a claim against his estate even though others may also be liable.

ARGUMENT

The "Stock Sale" agreement (attached to Exhibit 1) did not terminate nor did the obligations of McDonnell Seed Company to pay the balance of the purchase price thereunder cease upon the adjudication of Washburn-Wilson Seed Company or McDonnell Seed Company as a bankrupt. The appellees urge:

1. THAT THE APPELLANT, TRUSTEE IN BANKRUPTCY OF McDONNELL SEED COMPANY, IN THIS INSTANCE STANDS IN THE SHOES OF THE BANKRUPT SUBJECT TO THE SAME EQUITIES AND DEFENSES AS WOULD THE BANKRUPT.

> "It is elemental that the Trustee stands in the shoes of the bankrupt (except as against fraudulent conveyance and similar transactions which are not herein involved). . ."

Schultz v. England (C.C.A. 9, 1939) 106 F.2d 764, See also In re Midwest Tar Corp. (D.C.Md., 1956) 150 F.Supp. 163; In re Hercules Service Parts Corp.

(D.C.Mich., 1951) 101 F.Supp. 455; In re Webber Motor Co. (D.C. N.J., 1943) 52 F.Supp. 742; Lockhart v. Garden City Bank & Trust Co. (C.C.A. 2, 1940) 116 F.2d 658; In re Toms (C.C.A. 6, 1939) 101 F.2d 617, 619.

In considering the provision "Term" of the "Stock Sale" contract, it would be difficult to devise language more frankly and avowedly penal in character or more explicitly providing for a forfeiture.

> "A bankruptcy court is essentially a court of equity and will, therefore, not enforce a penalty."

In re Tastyeast, Inc. (C.C.A. 3, 1941) 126 F.2d 879 3 Colliers, Bankruptcy 1799 (14th Ed. 1941).

2. THAT THE RISK OF FORFEITURE UNDER THE CONTRACT CLAUSE, EVEN IF FOUND A VALID CLAUSE, SHOULD NOT BE INTERPRETED TO BECOME OPERATIVE BY A BANKRUPTCY CAUSED BY THE WRONGFUL AND FRAUDULENT CONDUCT OF THE

BANKRUPT.

> "The happening of a condition subsequen that by the specific terms of a contrac is to terminate a promisor's duty does not operate as a termination if the happening of the condition is caused or rendered inevitable by: (a) the promisor's unjustified conduct."
>
> <u>Restatement of the Law of Contracts</u>
>
> 307, p. 453.

A. THE LAW PRESUPPOSES THAT THE PARTIES TO A CONTRACT WILL DEAL FAIRLY IN THE PERFORMANCE THEREOF AND SUCH WOULD HAVE BEEN THE CONTEMPLATION OF THE PARTIES IN USING THE CONTINGENCY OF BANKRUPTCY TO TERMINATE THE CONTRACT. THIS IS ESPECIALLY TRUE IN THIS INSTANCE INASMUCH AS THE PURCHASER STOOD IN FIDUCIARY RELATIONSHIP TO THE SELLERS OF STOCK AND WASHBURN-WILSON SEED COMPANY.

> "Though the law cannot create contractual obligations which are not based on the expressed intention of the parties, it can excuse the per-either of conditions or promises

agreed upon by the parties for any reasons which seem to it just."

3 Williston on Contracts 769, p. 2170

(Re. Ed., 1958).

"It is a principal of the widest application that equity will not permit one to rely on his own wrongful act, as against those who are effected by it but who did not participate in it, to support his own asserted legal title or to defeat a remedy which except for his own misconduct would not be available."

Deitrick v. Greaney 309 U.S. 190,

60 S.Ct. 480, 84 L. Ed. 694.

"Every contract implies good faith and fair dealing between the parties to it."

17 C.J.S. 318 p. 738.

"The courts will endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other."

17 C.J.S. 319, p. 740.

B. AN INTERPRETATION OF THE WORD

"BANKRUPTCY" TO INCLUDE ANY BANKRUPTCY OCCURRING, WOULD ALLOW THE PURCHASER TO "PIRATE" THE ASSETS OF WASHBURN-WILSON SEED COMPANY, THUS DESTROY THE SECURITY HELD BY THE SELLERS, CAUSING THE OCCURRENCE OF THE BANKRUPTCY ELIMINATING ITS OBLIGATION UNDER THE CONTRACT, THEREBY BENEFITTING FROM ITS OWN WRONG. THE APPELLANT IS ESTOPPED TO URGE SUCH AN INTERPRETATION.

> "Express conditions subsequent will be regarded with disfavor if they are such as to cause a forfeiture, that is, if they permit a party to keep benefits received under the contract without giving their agreed equivalent.

> <u>Corbin on Contracts</u> Vol. 3, Sec. 748, p. 893.

> "It is a principal of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of that failure."

> 3 <u>Williston on Contracts</u> 677 p. 1952 (Re. Ed.)

"A condition may be excused without reason, if its requirements

a. will involve extreme forfeiture or penalty, and
b. its existence or occurrence forms no essential part of the exchange for the promisor's promise."

Restatement of the Law of Contracts 302

"It is a well-settled principal of law that one cannot profit from his own wrong doing or take advantage of his own wrong."

Scarborough v. Atlantic Coast Line Railroad Co. (C.C.A. 4, 1949) 178 F.2d 253; Wyoming Const. Co. v. Western Casualty Co. (C.C.A. 10, 1960) 275 F.2d 97; Allegheny County Housing Admin. v. Conisto Const. Corp. (D.C.Penn., 1950) 90 F.Supp. 1007.

"The axiom that no man can take advantage of his own wrong is especially applicable to a fiduciary."

Brown v. N.Y. Life Ins. Co. (D.C.O., 1945) 58 F.Supp. 252, affirmed 152 F.2d 246.

"The officers and directors of a corporation occupy a fiduciary relationship to the stock holders and corporatio[n]."

Hanny v. Sunnyside Ditch Co., 82 Idaho 271, 353 P.2d 406.

"Officers and directors shall be deemed to stand in a fiduciary relationship to the corporation, and shall discharge the duties in good faith, and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

Idaho Code 30-142

"A corporation which actually induces management action in its subsiduary will be treated itself as manager and will be made subject to all the fiduciary obligations towards the subsiduary which are imposed on the corporate directors themselves and will be held liable for mismanagement of the subsiduary through interlocking directors."

Overfield v. Pennroad Corp. (D.C.Penn., 1941) 42 F.Supp. 586, affirmed, 146 F.2d 889.

The foundation of estoppel is justice and good conscience. The doctrine of estoppe[l]

is in the main equitable, and, in the very nature there is some element of the maxim that one must come into a court of equity with clean hands. Certainly the conduct of the McDonnell Seed Company and its agents were prejudicial to the sellers of stock. The sellers could expect and rely on honest and fair performance of the McDonnell Seed Company under the contract. As has been stated, the doctrine of estoppel prevents a litigant from relying on his own wrong. As it were, it tempers the wind to the shorn lamb.

3. THE CONTRACT WAS BREACHED BY McDONNELL SEED COMPANY AS OF THE TIME THAT ASSETS OF WASHBURN-WILSON SEED COMPANY WERE FIRST TAKEN OR CONVERTED TO THE USE AND BENEFIT OF McDONNELL SEED COMPANY AND WAS IN DEFAULT AT THE TIME THAT BANKRUPTCY OCCURRED, THEREFORE, THE SELLERS HAVE THE REMEDY AVAILABLE OF BRINGING AN ACTION FOR THE RECOVERY OF THE BALANCE OF THE PURCHASE PRICE AS IS SET

FORTH AT PAGE 4 OF CONTRACT (Exhibit 1).

The District Judge in his written opinion (Tr. 85) determined that when the McDonnell Seed Company was first taking the assets of the Washburn-Wilson Seed Company, the contract was in effect and de facto in default and that the purchaser and it officers from the record are shown to have breached their fiduciary duty to the sellers and to have rendered the security worthless by their fraudulent conduct.

The appellant at page 12 of his brief states, "The record does not establish this. That the only part of the record which would even tend to show this is in the record only as part of the offer of proof by appellees. (Tr. 258-323)."

The referee, in complying with Section 39 of the Bankruptcy Act (11 U.S.C., 67) which requires the transcript of evidence or a summary thereof, be transmitted on the certification to the District Judge, for-

warded the transcribed record as well as a "Summary of Testimony" (Tr. 78-83). The referee makes no differentiation in the evidence as he sets it forth.

According to Sec. 2 a (10) of the Bankruptcy Act (11 U.S.C. 11), "the records, findings and orders" certified to the judge by the referee may be confirmed, modified, reversed, or returned with instructions for further proceedings by the reviewing district judge.

> "It has been frequently held that a referee's findings or conclusions are not entitled to great weight where based upon admitted facts or undisputed testimony or matter of record."
>
> Collier Bankruptcy Manual, Sec. 39.11 p. 430 (2nd Ed., 1961).

> "Where credibility of witnesses is not involved and the operative facts are undisputed, a district judge may freely draw different inferrences from those drawn by the referee in bankruptcy and in such situations, questions of law remain open for independent decision of the judge."

In re Graziani (D.C. N.Y., 1958)

166 F.Supp. 516, affirmed, McChesney

v. Sims (C.C.A. 2, 1959) 267 F.2d 215.

> "Where events appeared of record Circuit Court of Appeal was entitled to consider it, if admissible, even though the district court had actually excluded it for the purpose offered."

F.A. McGrow & Co. v. Milcon Steel Co.

(C.C.A. 2, 1945) 149 F.2d 301

4. THE CONTRACT CLAUSE ENTITLED "TERM" WAS DESIGNED FOR THE PROTECTION OF THE SELLER OF STOCK AND MAY BE ASSERTED BY THEM AT THEIR OPTION.

The Court in Farmers & Merchants Nat'l Bank v. Bailie, (D.C.A. Cal., 1934) 32 P.2d 157 at page 159 held that,

> "Notwithstanding a contract provided that a violation of its terms or conditions shall work a forfeiture and the contracts become void and of no effect. Such a provision means only that the rights of the party violating it shall cease, and it remains in effect so as to protect

the rights of the innocent party."

In general, forfeiture provisions are designed for the protection of the seller and may be exercised or not at his option. There are three forfeiture clauses in this contract and this is the only one which does not reserve to the seller an optional right. This clause should also be construed as added protection for the seller and not a device to be used as an instrument of fraud upon him.

The only closely comparable case discovered by respondents is that of Dasher v. Bruno (Ill., 1955) 216 N.E. 2d 404. In that case, the plaintiff and defendant executed a stock sale agreement, providing for monthly payments to the seller. The agreement to pay the purchase price was secured by deposit of the purchased stock with an escrowee until final payment had been made upon the contract. The final clause in this security arrangement permitted the purchaser to benefit by default,

which he did. In commenting upon this, the Court states:

> "Plaintiff who under the contract also gave up his rights of office in the corporate defendant, one or both of which were presumably salaried positions, would be penalized for defendant's default, and defendant, thus eliminating his obligations under the contract, would profit by his own default. Defendant's position is manifestly unsound."

Dasher v. Bruno (Ill., 1955), 216 N.E. 2d 404, 207.

The instant case demonstrates a more aggravated situation than was presented to the court in Dasher v. Bruno. The "Term" clause inserted in this contract is designed to protect the seller not to encourage a fraud upon him.

In effect, appellant blatantly asserts in argument that, under this clause, the bankrupt purchaser had a legal right to loot this corporation, to "pirate" its assets. Were this purchaser to have engaged in this

course of conduct and to have handed the shares of Washburn-Wilson stock, representing a now empty shell, back to the sellers, keeping the "pirated" assets, it would have received no aid from the courts; it could not have thus enriched itself at the expense of the sellers. The trustee-appellant stands in the shoes of the bankrupt and can no more urge that he has a right to do this than can the bankrupt.

Schultz v. England (C.C.A. 9, 1939) 106 F.2d 764.

Respondents urge that here, as in Dasher v. Bruno (supra), this clause is designed to protect the seller and, as a consequence, he has the option to rely upon it or resort to another remedy.

5. APPELLANT'S "UNCLEAN HANDS" BAR HIS RELIANCE UPON THE "TERM" CLAUSE.

The procedural steps in this case may

be described thus: The respondent-petitionr presents his claim, asserting a balance due on the purchase price; the trustee urges th "Term" clause as an affirmative defense, a condition subsequent defeating the claimants right to the purchase price by terminating the contract; respondent in turn urges that the appellants hands are unclean, that he is thereby prevented from urging this defense.

If this case were turned around and the bankrupt were suing the claimant in a court of equity, for instance to quiet title to the "looted" assets, he would clearly be met with the clean-hands defense. A situation somewhat similar to this has been before the Idaho Supreme Court on a previous occasion. In that case, the Idaho Supreme Court held:

> "The maxim, 'He who comes into equity must come with clean hands', imposes itself alike upon him who defends and upon him who prosecutes the suit in equity."

Witthoft v. Commercial D. & I. Co.,

46 Idaho 313, 268 Pac. 31.

In that case, two parties to a stock agreement agreed that the one to survive would take all the stock in the corporation. The two stock certificates involved were then placed in an envelope and in turn deposited in the corporate safe to which both parties had access. Thereafter, one of them went to the safe, took the certificates out and inserted his name in the blank on one of the certificates, in effect preventing proof of the agreement against him should he be the first to die. The other party, however, died first and, pursuant to the agreement, the survivor took his stock. The heirs of the deceased shareholder, discovering this conduct, instituted an action seeking to recover these shares of stock from the survivor. The survivor set up the agreement as an affirmative defense. The Court, however, held the defense barred by the "clean hands" doctrine.

So should it be in this case. The clause is here set up by the trustee as an affirmative defense, a condition subsequent destroying the obligation of the bankrupt to pay the purchase money due the seller. We urge that on this occasion and because of the structure of the suit at this point, the defense of "clean hands" prevents the affirmative defense relied upon by the bankrupt from being interposed to defeat the claimant's position.

6. THE "TERM" PROVISION IS REPUGNANT TO GOOD CONSCIENCE, INVITES FRAUD AND IS VOID SINCE CONTRARY TO PUBLIC POLICY.

> "It is true on the one hand that parties should be left to make their own bargains; it is equally true that they cannot be left to do so without some limitations."

<u>Insley</u> v. <u>State Mut. Life Assur. Co.</u> (Penn. 1909) 5 A. 2d 544.

> "Contracts are subject to the limitation that they must not contravene

public policy."

Stearns v. *Williams*, 72 Idaho 276,

240 P.2d 833.

In *Daniels* v. *Daniels* 81 Idaho 12,

36, P.2d 112 the Idaho Supreme Court holds:

> "It is against public policy to contract away legal rights and remedies in broad general terms."

> "Public policy of the State of New York does not permit one to profit by his own fraud, or to take advantage of his own wrong or to found any claim upon his own iniquity or to acquire property by his own crime."

Miller v. *The American Tobacco Co.*,

(D.C. N.Y. 1958), 158 F.Supp. 48.

> "The usual test applied by courts in determining whether a contract offends public policy and is antagonistic to the public interest is whether the contract has a tendency toward such an evil. . . if it is opposed to the interest of the public, or has a tendency to offend public good, it will be declared invalid, even though the parties acted in good faith and no injury to the public would result in the particular instance; the test to be applied is not what is actually done, but that which may or

> might be done under the terms of the contract; it is the evil tendency of the contract and not its actual injury to the public that is determinative, as the law looks to its general tendency and closes the door to temptation by refusing to recognize such agreements."

Stearns v. Williams supra.

From the date of purchase of the stock of Washburn-Wilson Seed Company to the date of bankruptcy, the officers and directors were identical. (Tr. 152 and 164). Leo McDonnell owned all of the stock of McDonnell Seed Company (Tr. 155) and during this period there were no formal meeting of directors held. (Tr. 153).

In Kessler v. Jefferson Storage Corp. (C.C.A. 6, 1941) 125 F.2d, the Court said:

> "Where the object or tendency of a contract is to constitute a breach of duty on the part of one who stands in a confidential or fiduciary relation, it is illegal and void, as tending to be, or being a fraud on third persons.
>
> "Not only is it stated that such

agreements are against the public policy of securing faithful discharge of duties by persons holding positions of trust and confidence but agreements tending to cause unfaithful conduct by fiduciaries are illegal because they are, in effect, agreements to wrong or defraud persons whose interests the fiduciaries have in charge; *Marine Northwest Development Co.* v. *Northern Commercial Co.* (D.C. Wash., 1914) 213 F.103; and contracts which tend to induce an officer of a corporation to act wrongfully or in disregard of the interests of the corporation are of this nature and are invalid."

7. A PROVISION OF A CONTRACT WHICH MAY BE VOID OR UNENFORCEABLE DOES NOT IN ITSELF VOID THE REMAINDER OF THE CONTRACT.

The contract clause entitled "Term" was held by the District Court in his written opinion to be void as against public policy and directed that the referee overrule objections of the trustee to claims of stockholders under the stock sale contract. (Tr. 86).

"The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration.

"If the obnoxious feature of a contrac
can be eliminated, without impairing
its symmetry as a whole, the courts
will be inclined to adopt this view
as the one most likely to express the
intention of the parties."

Kessler v. Jefferson Storage Corp.

(C.C.A. 6, 1941) 125 F.2d 108.

"It is well established that the fact
that a stipulation is unenforceable
because of illegality does not effect
the validity and enforceability of
either stipulations in the agreement,
provided they are severable from the
invalid portion and capable of being
construed divisibly. Moreover, it
makes no difference whether there are
two distinct promises, whether there
is one promise that is divisible, or
whether the consideration for the two
promises is entire or apportionable.
At least, this is true where the
illegal provision is clearly seperable
and severable from the other parts
which one relied upon and does not
constitute the main or essential
feature or purpose of the agreement."

12 Am.Juris. 220, p. 738, Hill v.

Schultz, 71 Idaho 145, 227 P.2d 586.

8. A DEBT OF THE BANKRUPT IS NONE THE LESS PROVABLE AS A CLAIM AGAINST HIS ESTATE EVEN THOUGH IT MIGHT BE COLLECTED FROM OTHE

An independent suit has been filed against Mr. McDonnell, the President of both Washburn-Wilson Seed Company and McDonnell Seed Company, charging him with fraudulent diversion of the assets of Washburn-Wilson Seed Company to the detriment of its shareholders, by your respondents on this appeal. This suit is being held in abeyance pending the outcome of this litigation. Conceivably, the corporations involved would also have an action against Mr. McDonnell.

On page 8 of appellant's brief, this statement appears:

> "The parties obviously anticipated this possibility of bankruptcy of one or both the corporations. This being a rather unusual provision, it seems clear that the parties were aware of facts concerning Washburn-Wilson Seed Company, and possibly also of McDonnell Seed Company, that prompted inclusion of this paragraph."

The inference which appellant would expect to be drawn from this is that the parties were aware of the pendency of bank-

ruptcy of these companies. This statement is totally devoid of support in the record which, quite to the contrary, discloses tht the assets of Washburn-Wilson Seed Company were two and one-half ($2\frac{1}{2}$) times its liabilities at the time of the sale of its stock (Tr. 222).

> "A debt of the bankrupt is none the less provable as a claim against his estate because it might also be collected from others."

3 Colliers on Bankruptcy, 63.03 (2), p. 1769 (14th Ed.); Robinson v. Hamilo Wholesale Liquor Co. (C.C.A. 6, 1942) 132 F.2d 285; Matter of Dahnke-Walker Milling Co. (D.C. Tenn., 1924) 1 F.2d 404.

CONCLUSION

It would violate fundamental concepts of honesty and fair play and be contrary t basic concepts of the law of contracts and

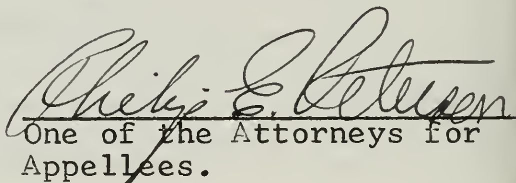
equity to allow the appellant, trustee in bankruptcy of McDonnell Seed Company, whose rights are directly affected by the conduct of the bankrupt, to now state that I have wronged you, caused the occurrence of bankruptcy by looting the corporation, destroyed the very security upon which you relied but inasmuch as it is stated in the contract that bankruptcy should terminate the contract, you have no remedy against my wrong. The equities of the situation cry out against the position of appellant.

A person who has insured his house against fire, may not burn it to the ground and them claim its value from the insurer, relying upon the fact that the contract did not prohibit such conduct. Evidence showing cause of the fire is surely relevant as is evidence showing cause of the bankruptcy in the case now before the court.

If the contract clause must be interpreted literally to mean that the contract terminates upon the happening of _any_ bank-

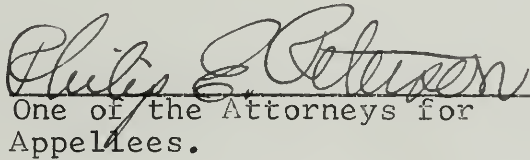
ruptcy, then such a clause should be held void as against public policy; for it grants license to a fiduciary to act wrongfully and in disregard of the interests of the corporai and persons whose interests the fiduciary ha in charge. If the contract clause is stricty enforceable, regardless of the conduct of th bankrupt, then it becomes a contractual mean whereby fraud and wrongdoing must be counte- nanced and favored by the Court. Respondent therefore, prays that the decision of the District Court be affirmed.

Respectfully submitted,



One of the Attorneys for Appellees.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



One of the Attorneys for Appellees.